

Cambridge University Press

978-0-521-60597-7 - Cranston's Consumers and the Law, Third Edition

Colin Scott and Julia Black

Excerpt

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Chapter 1

Introduction: the context of consumer protection

I PROBLEMS FACING CONSUMERS

Do you trust a secondhand car salesman to give you the correct information about a car? Is the medicine that you have just bought going to have any effect? Does your builder really know what he's doing? Do mobile phones emit brain-scrambling airwaves? Is that low fat chocolate bar really low in fat? Did you pay the right price for your stereo or the extended warranty you just bought with it? Do you have any idea what the right price would be?

Consumer law and consumer regulation are ostensibly aimed at providing consumers with protection from, and rights against, producers and suppliers of goods and services. But how necessary are those measures? To what extent are consumers disadvantaged? And how should we see the consumer, and, more fundamentally, consumption itself? In many debates on the need for consumer protection, particularly economic debates, consumers are posited as sovereign economic actors, with stable preferences that have been formulated rationally and autonomously, and who have the potential to exercise power in the economic system by their purchasing choices, so ensuring that producers and suppliers respond to meet those preferences. In this model, it is the role of consumer protection to enable those choices to be made more efficiently.

Others question both the model of consumer sovereignty and the desirability of assisting or encouraging consumption. In 1958, JK Galbraith argued that rather than the consumer determining the pattern of production, it was the producers and suppliers of goods and services that controlled consumer demand. Advertising, marketing, packaging, market research all serve to shift the decision of what to consume from the consumer to the producer. As for fulfilling consumer's wants or needs:

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'[p]roduction only fills the void that it has itself created'.¹ This 'dependence effect' means that if production is to increase, wants must effectively be contrived.²

The fact that wants can be synthesised by advertising, catalysed by salesmanship, and shaped by the discrete manipulations of the persuaders shows that they are not very urgent. A man who is hungry need never be told of his need for food.³

Producers are not alone in creating consumer desires, however, Galbraith argues. The urge to consume is fathered by a value system which places great emphasis on the ability to produce, and which thus evaluates people by what they consume.⁴ Others have taken the theme of social construction much further, and argued that rather than seeing the process in terms of individual needs being created for individual products, what is produced by society is a system of needs and an overall propensity to consume.⁵ In this view consumption is in affluent societies based not on needs and enjoyment but on complex codes in which what an individual consumer buys indicates their social class and status. Consumption is for communicating at once social affiliation and social demarcation. What you consume signifies to others the type of person you are and your social position. Consumption is a system of values, which encompass the value of production, but also social integration and differentiation. Consumption, or more particularly, the language of consumption, the language of what different commodities signify, is furthermore a system which has to be learnt: 'the consumer society is also the society of learning to consume, of social training in consumption'.⁶ The perspective from which such arguments would view consumer law and policy is a less comfortable one: that in facilitating consumption such policies simply serve to enhance the dependence effect, and to encourage the pathologies to which consumption can lead.

It is probably fair to say that it is a modified consumer sovereignty view that informs much of the post-war development of consumer law and policy in the UK and underlies current government thinking, as it engages in processes of reform. The opening statement of the 1999 White Paper on

¹ JK Galbraith *The Affluent Society* (Andre Deutsch, 4th edn, 1984) p 127 and generally Chapter 11.

² JK Galbraith *The Affluent Society* p 133.

³ JK Galbraith *The Affluent Society* p 131.

⁴ JK Galbraith *The Affluent Society* p 129.

⁵ J Baudrillard *The Consumer Society: Myths and Structures* (Sage Publications, transl 1998; Editions Denoel, 1970), especially Chapter 5.

⁶ J Baudrillard *The Consumer Society: Myths and Structures* p 81.

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consumer law states '[c]onfident consumers, making informed decisions in modern, competitive markets, promote the development of innovative, good value products.'⁷ Consumer policy is focused on redressing consumer detriment. Defining detriment is not a straightforward task, however. It has been defined in part as the difference in purchasing decisions that consumers make on the basis of information that is available, and decisions they would have made with further information that they could usefully obtain and assimilate.⁸ The principal government body responsible for consumer issues, the Office of Fair Trading (OFT), is engaged in a process of determining how detriment may be further defined and measured, for example defining it in terms of lost welfare,⁹ and of identifying indicators of detriment in terms of costs of complaining both financially and in terms of emotional stress.¹⁰

One indication of detriment is the number of complaints that are made. Between 78.5 million and 93.1 million complaints were made by consumers in 1999.¹¹ Just over half of those complaints concerned the quality of products or services, the second largest category (15%) related to selling techniques or misinformation, and 10% concerned problems in obtaining redress.¹² Given that only 29% of consumers complain, this is likely to be an underestimation of the level of dissatisfaction experienced.¹³ In 65% of cases, the reason given for not complaining was that the person felt it would not do any good.¹⁴ Indeed, of those that did complain, only 36% reported that they were very satisfied or quite satisfied with the outcome, as opposed to 43% who stated they were either very dissatisfied or quite dissatisfied.¹⁵ Complaining is also expensive. The total estimated cost of all complaints in 1999 was between £5.6 billion and £11 billion. Taking the mid-range measurement of £8.3 billion, the OFT calculated that this represented 1.5% of total household consumer expenditure, or £180 per adult per annum.¹⁶

⁷ DTI *Modern Markets: Confident Consumers* (Cm 4410 (1999)).

⁸ London Economics, *Consumer Detriment under Conditions of Imperfect Information*, OFT Research Paper 11 (HMSO, 1997).

⁹ R Vaughan, *Distributional Issues in Welfare Assessment and Consumer Affairs Policy*, Appendix to OFT, *Vulnerable Consumers and Financial Services* (HMSO, 1999).

¹⁰ *Consumer Detriment*, OFT 296, February 2000.

¹¹ *Consumer Detriment*, OFT 296, February 2000.

¹² *Consumer Detriment*, OFT 296, February 2000, Table 5.2.

¹³ Consumers' Association *Handled with Care? Consumer Complaints 1991–1997* p 8 (1997 figures); the number was down from 49% in 1994.

¹⁴ Consumers' Association, *Handled with Care? Consumer Complaints 1991–1997* p 13.

¹⁵ OFT, *Consumer Detriment*, Table 7.1. Similar results were found by the Consumers' Association, *Handled with Care*, p 17.

¹⁶ OFT *Consumer Detriment* para 6.17.

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However consumer dissatisfaction only measures those instances where consumers are aware or think that they have cause to complain. As a gauge of the extent to which consumers are disadvantaged by producers or suppliers, it is a very approximate measurement. Not only might consumers not take the trouble to complain, but for reasons that are explored below they might not be aware that they have cause to do so. The problem is exacerbated in the case of taking legal action, for not only are the costs significantly higher than for making a complaint to the company concerned, but two-thirds of people are not aware of their legal rights.¹⁷

2 VULNERABLE CONSUMERS

The problems that consumers face in the market are not the same for all consumers and can fall most heavily on vulnerable consumers, in particular on low income consumers. Research published by the Office of Fair Trading (OFT) in 1998 identified seven categories of vulnerable consumer: those on low income, the unemployed, those suffering long-term illness or disability, those with low levels of educational attainment, members of ethnic minorities, older people and the young.¹⁸ The categories are not mutually exclusive, and a key common characteristic of the members of those groups was low income.¹⁹ The report found that those who were members of the potentially vulnerable groups were likely to be on low income, and four-fifths of those on low incomes were in one or more of those groups.²⁰ Consumer protection is thus not just a middle class issue. Instead, as Caplovitz noted in the 1960s in *The Poor Pay More*, it is a matter of vital importance for the less well off members of society.¹ Their interests are somewhat different, however, from what has been conventionally regarded as the main concern of consumer protection. There is still the need that the products and services they buy should be

¹⁷ DTI *Modern Markets: Confident Consumers*, Cm 4410 (The Stationery Office, 1999), para 1.5.

¹⁸ OFT *Vulnerable Consumer Groups: Quantification and Analysis*, Research Paper 15 (Ramil Burden (OFT, 1998)).

¹⁹ Very low income is defined by the OFT as those whose income is between £4,000–£7,000 per year, low income as those households whose income is between £5,000 and £8,000 per year (within that the amounts vary with the type of household, eg single lone pensioner, lone parents, couples with children): OFT *Vulnerable Consumer Groups: Quantification and Analysis*, Research Paper 15 (Ramil Burden (OFT, 1998)).

²⁰ OFT *Vulnerable Consumer Groups: Quantification and Analysis*, Research Paper 15 (Ramil Burden (OFT, 1998)).

¹ David Caplovitz *The Poor Pay More* (Free Press, 1963).

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satisfactory and provide value for money, 'but the fuel bill rather than the faulty washing machine is ... symbolic of the central consumer issue' for low income consumers.²

The welfare impact of consumer detriment is also greater on those with lower incomes (a loss of £10 per week is more significant to someone with a weekly income of £100 than it is to someone with a weekly income of £1,000).³ So overpaying for goods or services has more of an impact on those with low incomes than on those with higher incomes. Those on lower incomes also tend to pay more for what they purchase. One report suggested that prices for the goods in shops in lower income neighbourhoods in the UK were up to 60% above the average price for such goods in supermarkets.⁴ Access to supermarkets or other larger stores may be difficult for many people on low incomes due to poor provision of public transport, and levels of car ownership being low.⁵ Other factors may also enter, such as the non-availability of credit facilities in stores outside the area. Further the lack of financial resources or storage facilities may necessitate the constant purchase of small quantities, which can be more expensive.

A further difficulty which low income consumers face is financial exclusion. The issue of financial exclusion is one that has only recently arrived on the public agenda, and the issue is of such topicality that even the British Banker's Association has become involved in studies on exclusion of low income and ethnic minority groups from access to basic financial services.⁶ The government has been considering how the rules surrounding credit unions could be altered to increase their role in providing

² David Caplovitz *The Poor Pay More*. See also Social Exclusion Unit *Bringing Britain Together: A National Strategy for Neighbourhood Renewal* (Cm 4045 (1998)) para 1.27; NCC *For Richer, For Poorer* (1975) pp 9–14; David Piachaud *Do the Poor Pay More?* Poverty Research Series 3 (Child Poverty Action Group, 1974) p 5. Alisdair Aird 'Goods and Services' in Frances Williams (ed) *Why the Poor Pay More?* (NCC, 1977) pp 14–15. See generally Alan R Andreasen *The Disadvantaged Consumer* (Free Press, 1975); Ronald Sackville *Law and Poverty in Australia* (AGPS, 1975) Chapter 4.

³ See further F Cowell and K Gardiner *Welfare Weights*, OFT Research Paper 20 (January 2000).

⁴ Social Exclusion Unit, *Bringing Britain Together: A National Strategy for Neighbourhood Renewal* (Cm 4045 (1998)) para 1.27.

⁵ Frances Williams *Why the Poor Pay More?* (NCC, 1977).

⁶ The BBA, the DTI and the Commission for Racial Equality launched a joint project on the difficulties faced by ethnic minority businesses in the UK, particularly in relation to obtaining finance and business support. The two year project is due to start in 2000. Also starting from 2000 the BBA is to provide an Annual Community Involvement Report on promoting enterprise in deprived areas: BBA Briefing Point, 2 November 1999.

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credit to those on low incomes.⁷ It appointed a review of the competitiveness of the banking industry under Don Cruickshank,⁸ and the OFT has recently completed a survey on the access that vulnerable consumers have to basic financial services.⁹ Basic financial services are identified as bank or building society accounts, home contents insurance, short-term credit and long-term savings.¹⁰ 38% of those on very low incomes, and 24% of those on low incomes do not have a bank or building society account; over 50% of both groups have no credit. For the majority of those without bank accounts or credit facilities, the reason given was that they preferred to budget using cash,¹¹ although there is reason to think that in some cases lack of an account may be an imposed choice: banks refuse around 25% of applications made.¹² Whilst a preference for cash may in some circumstances be understandable, relying solely on cash does pose several disadvantages. Only 12% of employees are paid in cash; having a bank account can thus in effect be a condition of employment.¹³ Further, a number of goods are cheaper if bought over the telephone, or if paid for by direct debit. The government's Green Paper on utility regulation showed that gas consumers who settle their accounts on direct debit pay an average of 12% less than those who use pre-payment meters and 7% less than those paid on receipt of a quarterly bill; the figures for electricity were 8% and 3% respectively. Of those using pre-payment meters, over 50% were on incomes of £12,000 per year or less.¹⁴

⁷ HM Treasury *Taskforce Report: Credit Unions of the Future* (November 1999).

⁸ Review of Banking Services in the UK, *Banking Review: Interim Report* (1999); *Competition in UK Banking* (March 2000).

⁹ *Vulnerable Consumers and Financial Services, The Report of the Director General's Enquiry* (OFT, 1999).

¹⁰ *Vulnerable Consumers and Financial Services, The Report of the Director General's Enquiry*, p 19.

¹¹ OFT *Vulnerable Consumers and Financial Services, Appendix 4—The Consumer Survey*, p 4.

¹² OFT *Vulnerable Consumers and Financial Services: The Report of the Director General's Enquiry*, p 25.

¹³ OFT *Vulnerable Consumers and Financial Services: The Report of the Director General's Enquiry*, p 20.

¹⁴ OFT *Vulnerable Consumers and Financial Services: The Report of the Director General's Enquiry* and DTI *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation* (HMSO, 1998).

¹⁵ Though, following the second Cruickshank report (noted above) the banks have reached a voluntary agreement not to charge their own customers a 'disloyalty fee' and to make any charges levied on users of their own ATMs known prior to completion of the transaction. Cruickshank additionally envisaged the development of ATMs by a wide range of commercial actors (such as petrol stations and post offices) other than banks. The development of charging for use

Table 1: Use of financial services by low income consumers*

<i>Financial service</i>	<i>Very low incomes</i>	<i>Low incomes</i>
Bank/building society a/c	62%	76%
Use of credit		
High Street	25%	32%
Non commercial	15%	8%
Pawnbrokers/loan sharks	5%	3%
No credit at all	55%	57%
Home contents insurance	46%	68%
Savings products		
Long-term savings	8%	15%
Post office schemes	18%	30%
Easy access savings	33%	44%
No savings products	54%	39%
Life insurance products	19%	27%
Endowment mortgages	3%	5%

* Compiled from *Vulnerable Consumers and Financial Services*, Appendix 4—*The Consumer Survey* (OFT, 1999).

Those who are on very low or low incomes who do have a bank account also face potential, and one may assume unwanted, exclusion, as they are likely to be the most affected by branch closures. Over the period 1989–1996 the number of bank branches fell by 22%, falling fastest in rural areas. Although there has been an increase in the number of automatic teller machines (atms) and in telephone banking, these are unlikely to be of assistance to those on low incomes. The majority of cash dispensers are installed at bank branches, and of those that are not, very few are situated in poorer areas. The range of services offered by atms is limited, and increasingly banks are charging if customers of other banks use their atms.¹⁵ As regards telephone or internet banking, those most affected by branch closures are those least likely to have access to a telephone or computer. Three times as many households in poor neighbourhoods do not have their own telephone compared with other areas.¹⁶ One survey found only 26% of those on low incomes had access to a telephone, and only 8% of the poorest fifth of households own a computer, compared to

of atms, based on a flat rate per transaction, exemplifies the tendency of the poor (who tend to make lower value withdrawals) to pay more, since charges are greater relative to the value of the transaction on lower value withdrawals.

¹⁶ Social Exclusion Unit *Bringing Britain Together* para 1.27.

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57% of the richest fifth.¹⁷ A further survey found that 18% of people overall felt alienated from information technology and a further 40% remained unconvinced or were concerned about it, with the highest figures concentrated amongst those from poor backgrounds.¹⁸

Vulnerable consumers do not only face problems of exclusion from certain services, but may be disproportionately affected by questionable marketing techniques, although as the recent pensions misselling scandal highlighted all consumers can be misled by dubious sales tactics.¹⁹ Added to these problems is the fact that poorer consumers are less likely to use their legal rights as consumers than those on higher incomes. Knowledge and understanding of the legal position and of where to seek assistance decline as one progresses down the socio-economic groups. In addition to a deficiency of knowledge, lack of confidence may be another explanation why the less affluent do not take advantage of their legal rights. It may be that low expectations of success deter many from complaining. Alternatively, consumers may be unwilling to jeopardise their relations with a business by complaining, for example, if it is their sole source of credit.

3 THE CONSUMER AS CITIZEN

The present work adopts a narrow view of the consumer interest and focuses mainly on citizens entering transactions to obtain products and services from commercial enterprises. Transactions involving land are mentioned only incidentally. In this sense the scope of the book coincides with what is generally regarded as the thrust of consumer protection legislation; such legislation confines itself to transactions involving 'goods' and 'services'. The meaning of 'goods' does not extend to tenancy agreements or to social welfare benefits,²⁰ although the definition of services is more extensive, encompassing a contract for work, including work of a professional nature (but not under a contract of employment).¹ In another way much regulation relevant to consumer protection has a wider ambit than the present work, since it applies to transactions between

¹⁷ OFT *Vulnerable Consumers and Financial Services: The Report* pp 23–24.

¹⁸ Social Exclusion Unit *Bringing Britain Together* para 1.27.

¹⁹ OFT *Vulnerable Consumers and Financial Services: The Report* pp 16–17; on pensions misselling see J Black and R Nobles 'Personal Pensions Misselling: The Causes and Lessons of Regulatory Failure' (1998) 61 MLR 789. For an excellent account of a wide range of dubious selling tactics see A Leff *Swindling and Selling: The Story of Legal and Illegal Congames* (Macmillan, 1976).

²⁰ For example, Fair Trading Act 1973, s 137(3); Supply of Goods and Services Act 1982, s 12, cf Trade Practices Act 1974 (Aust), ss 4(1), 74(3).

¹ Unfair Contract Terms Act 1977, s 6(2)–(3).

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commercial parties as well as to consumer transactions. In this sense the present book is about what the Germans call the *Endverbraucher*—the ultimate consumer. Some recent legislation is specifically confined to *consumer* transactions. Thus exemption clauses are generally nullified in *consumer* sales but not automatically in commercial transactions. Statutory orders can be made under the Fair Trading Act 1973 if the economic interests of *consumers* are prejudiced. In general terms a 'consumer' is defined in the Fair Trading Act 1973 as one who does not contract in the course of a business carried on by him but who deals with someone who does.² The Unfair Contract Terms Act 1977 adds the requirement for consumer deals that the goods must be of the type ordinarily supplied for private use or consumption.³

But there is a wider view of the consumer interest in which the term 'consumer' is virtually equated with the term 'citizen'. It is said that the consumer interest is involved when citizens enter exchange relationships with institutions like hospitals, libraries, police forces and various government agencies, as well as with businesses.⁴ Indeed, ever since its establishment in 1975 the National Consumer Council has been concerned with the users of public services as well as with users of commercial services, and with their rights to full information, to choice whenever possible, and to treatment with full consideration. It has published a number of reports on the quality of public services and has campaigned actively for greater consumer involvement in setting the standards for service provision. Together with the Service First Unit in the Cabinet Office it conducted research into how users of public services could draw up new service standards and the impact that had on service providers,⁵ and advised on the formation of guidelines on consultation practices for government departments and service providers.⁶

The well-known consumer campaigner in the US, Ralph Nader, did much to equate the term consumer with citizen. Originally he began with a narrow focus similar to that adopted in the present work. Quickly he became aware that the cause of consumer protection narrowly defined was inextricably linked with the cause of the consumer as citizen. At the head of Nader publications were the words:

There can be no daily democracy without daily citizenship. If we do not exercise our civic rights, who will? If we do not perform our civic duties, who

² Fair Trading Act 1973, s 137(2).

³ See further Chapter 3.

⁴ Mancur Olson *The Logic of Collective Action* (Harvard University Press, 1965) p 166.

⁵ Service First Unit *Involving Users in the Delivery of Local Public Services* (March 1999).

⁶ For further information see <http://www.ncc.org.uk>

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can? The fibre of a just society in pursuit of happiness is a thinking active citizenry.

Nader used the idea of citizenship to enhance the notion of consumerism, and by invoking the example of individuals as recipients of public services moved the model of the consumer beyond the concerns of mere consumption to one of active, and rightful, participation of individuals in social and political life. In the last decade or so, however, the argument in the UK has been that rather than recognising individuals as citizens, the introduction of standards stipulating what individuals can expect from public services has turned individuals from citizens to consumers.⁷ The mechanisms of public service delivery have been transformed with the introduction of measures such as privatisation, next step agencies, the new public management initiative, citizens' charters, and the contracting out of local authority services. Although accountability of government and other service providers to those who receive those services may at one level appear to have increased, individuals have had very little say in what those standards should be. Rather than being given the opportunity to participate as active citizens in a debate as to what the role of the state should be, individuals have rather been treated as passive recipients, consumers, of those services.

Others might argue that even the concept of the consumer as citizen is limited, because it implicitly accepts the existing order of things. As noted above, much has been written about how advertising creates needs, generates consumption and thus perpetuates modern capitalism—a view given wide currency by Galbraith. Curbing advertising abuse does not affect this fact. Writers like Illich see an all-pervading societal domination over people's lives; in the area of consumption products, rather than non-industrial ways of satisfying needs, dominate. Consumer protection in this view is a mere palliative to such domination, for it perpetuates it, perhaps with slight modification. Illich expresses the point thus:

Consumers cannot do without cars. They buy different makes. They discover that most cars are unsafe at any speed. So they organise to get safer, better and more durable cars and to get more as well as wider and safer roads. Yet when consumers gain more confidence in cars, the victory only increases society's dependence on high-powered vehicles—public or private—and frustrates even more those who have to, or would prefer to, walk.⁸

An analysis of the role of consumer protection law in promoting consumption and thus upholding capitalism and issues of the nature of

⁷ A Barron and C Scott 'The Citizen's Charter Programme' (1992) 55 MLR 526.

⁸ I Illich *Tools for Conviviality* (Calder & Boyars, 1973) p 56.